84-209

No.

in the

Supreme Court

of the

United States

OCTOBER TERM, 1984

RUSSELL HUFFMAN,

Petitioner,

vs.

STATE OF INDIANA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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17pp

QUESTION PRESENTED

DID A SUBSTANTIAL VARIANCE OCCUR WHEN THE STATE OF INDIANA WAS ALLOWED TO OFFER PROOF AND ARGUMENT THAT THE PETITIONER COMMITTED THE ALLEGED OFFENSE ON DATES OTHER THAN THOSE NAMED BY THE STATE IN ITS RESPONSE TO NOTICE OF ALIBI, REQUIRING THE CONVICTION BE VACATED.

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_____

The Petitioner, RUSSELL HUFFMAN, respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the Court of Appeals of Indiana on January 23, 1984 as affirmed by the Indiana Supreme Court on June 5, 1984.

OPINION BELOW

The opinion of the Court of Appeals of Indiana was a memorandum decision and is attached as Appendix A. An Amended Petition for re-hearing was filed February 8, 1984 and a Petition to Transfer was denied by the Indiana Supreme Court without opinion on June 5, 1984. A copy of the order is attached as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on June 5, 1984. This petition for certiorari is filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3) .e

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V: Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ., nor be deprived of life, liberty, or property, without due process of law. . .

United States Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right . . .to be informed of the nature and cause of the accusation. . .

STATEMENT OF THE CASE

On November 24, 1982, the respondent filed an information charging the petitioner with child molesting, a Class C felony, alleging that the petitioner had had sexual intercourse with a child between the ages of twelve years and sixteen years. (Tr. p. 8). On January 10, 1983, the defendant filed his alibi notice. (Tr. p. 15, 16). On March 28, 1983, the State of Indiana filed its response to notice of alibi in which it alleged the offense occured on October 19 or October 20. (Tr. p. 35).

The State then proceeded to produce evidence that the alleged offense took place on dates other than October 19 and October 20. The State called Jennifer Summers who testified that she had sex with Russell Huffman but the State was unable to establish a date. She did testify that she had sex in the middle of the week and that the last time was a week before her mother found out. (Tr. p. 95-97).

The State then called Sandra Summers, the mother of Jennifer Summers, but was again, unable to establish a date.

The State, in its response to notice of alibi had alleged the offense occurred on October 19 or October 20. Relying upon this, the defendant had prepared and presented his defense to account for the defendant's whereabouts on October 19 and October 20. (Tr. p. 271-282). The defendant attempted to establish a date of the alleged offense but like the State, was unable to do this.

The defendant then moved to strike the testimony of Jennifer and Sandra Summers because, through their testimony, the State had produced evidence that the de-

fendant had had intercourse with Jennifer Summers but had not been able to establish a date. (Tr. p. 181-184). The State had produced evidence that the defendant had had sexual intercourse with Jennifer Summers at a time other than that alleged by the State in its response to alibi notice. (Tr. p. 181-84).

Defendant's motion to strike was overruled by the Court and continued questioning of the witness failed to establish a date. (Tr. p. 185).

REASONS FOR GRANTING THE WRIT

A SUBSTANTIAL VARIANCE BY THE PROSECUTION DURING THE OFFERING OF PROOF AND ARGUMENT AS TO THE TIME WHEN A CRIME HAS OCCURRED FROM THAT ALLEGED BY THE PROSECUTION IN A RESPONSE TO ALIBI WHICH MISLEADS THE PETITIONER IN PREPARING OR MAINTAINING HIS DEFENSE DEMANDS THAT HIS CONVICTION BE VACATED.

In *Berger* v. *United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935), and *Bennett* v. *United States*, 227 U.S. 333, 33 S. Ct. 288, 57 L. Ed. 531 (1913), this Court established the rule that a variance between charge and proof can affect the substantial rights of a defendant in a criminal case if the effect of the variance is to prevent the defendant from presenting his defense properly, or if it takes him unfairly by surprise, or if it exposes him to double jeopardy.

As pointed out by this Court in *Berger, supra:*

> The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. *Berger, supra* at 630 citing *Bennett* v. *United States,* 227 U.S. 333, 338, 33 S. Ct. 288, 57 L. Ed. 531; *Harrison* v. *United States* (C.C.A.) 200 F. 662, 673; *United States* v. *Wills (C.C.A.) 36 F. (2d) 855, 856, 857 Cf. Hagner* v. *United States,* 285 U.S. 427, 431-433, 52 S. Ct. 417, 76 L. Ed. 861.

The trial court erred in overruling the defendant's motion to strike the testimony of Jennifer Summers and her mother, Sandra Summers. In so doing, the State was allowed to offer evidence and argument that the defendant committed the alleged offense on days other than those named by the State in its Response to Notice of Alibi.

A substantial variance by the State during the offering of proof and argument as to the time when a crime has occurred from that alleged by the State in a Response to Alibi which misleads an accused in preparing or maintaining his defense constitutes reversible error.

Defendant's defense was directed to accounting for his whereabouts on the days of October 19th and October 20th. (Tr. p. 271-282). The variance by the State in presenting evidence that the crime may have occurred on days other than October 19th and October 20th rendered useless his defense. The defendant was substantially misled by the State's action in alleging the dates of October 19th and October 20th as the dates when the alleged offense took place and then presenting evidence that the offense may have occurred on other days. Such action substantially prejudiced and maintaining his defense and as such was a substantial variance.

WHEREFORE, the Petitioner respectfully moves the Court to grant the petition for a writ of certiorari and to vacate the conviction of the petitioner; and for all other proper relief in the premises.

Respectfully submitted:

VANSTONE & KROCHTA

By: _____

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Attorneys for Plaintiff

Appendix

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APPENDIX A

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

RUSSELL HUFFMAN,)
Defendant Appellant)
)
—vs—)
)
STATE OF INDIANA,)
Plaintiff-Appellee)

NO. 1-683 A 176

APPEAL FROM THE
VANDERBURGH CIRCUIT COURT

The Honorable William H. Miller, Judge

Cause No. 3698

NEAL, P.J.

MEMORANDUM DECISION
STATEMENT OF THE CASE

Defendant-appellant, Russell Huffman (Huffman), was convicted by a Vanderburgh Circuit Court jury of child molesting under IND. CODE 35-42-4-3(c), a Class C felony. From a sentence of seven years he appeals.

We affirm.

ISSUES

Huffman presents three issues on appeal. He contends that the trial court erred in:

I. Finding the victim competent to testify;

II. Overruling his motion to strike the State's evidence because it tended to prove that the offense occurred on dates other than those fixed in the State's repsonse to Huffman's notice of alibi;

III. Overruling his motion for judgment on the evidence based on the State's failure to prove the offense occurred on the dates stated in the State's response to the notice of alibi.

Issues II and III are interdependent and will be discussed together.

DISCUSSION AND DECISION

Issue I.

Huffman, age 26 years, was charged with unlawful sexual intercourse with JAS, a child 12 years of age. Prior to her testimony, the trial court conducted a hearing out of the presence of the jury relative to JAS's competency to testify. Evidence at that hearing disclosed that she understood the purpose of being in court; that she knew the difference between truth and falsity, and the meaning of an oath; she understood right and wrong and that she could go to jail for stealing

and lying. However, she was unable to verbalize a description of certain posed acts put forth by defense counsel. While she knew the color orange, she did not know the color blue. She was not good at math and thought there were 107 days in a year. Other evidence in the record disclosed she was enrolled in special education classes in school, that she had learning disabilities, and read at a third grade level. The trial court found her competent to testify.

In *Ware* v. *State*, (1978) 268 Ind. 563, 376 N.E. 2d 1150, 1151, our Supreme Court stated:

> "It is clearly established in Indiana that any person ten years of age or older is presumed to be competent to testify in a criminal case. *Jethroe* v. *State*, (1974) 262 Ind. 505, 319 N.E. 2d 133. The defendant has the burden of establishing that the witness is not competent. *Wedmore* v. *State*, (1956) 237 Ind. 212, 143 N.E. 2d 649. The competency of a challenged witness is to be decided by the trial court as a matter of law. *Kimble* v. *State*, (1974) 262 Ind. 522, 319 N.E. 2d 140. This issue of competency is not to be confused with the credibility of a witness, as credibility is to be determined by the jury. *Kimble supra.*
>
> It is the general rule that unsoundness of mind does not per se render a witness incompetent, the test of competency of a witness is whether the witness has sufficient mental capacity to perceive, to remember and to narrate the incident he has observed and to understand and appreciate the nature and obligation of an oath. *Greco* v. *State*, (1960) 240 Ind. 584, 166

N.E. 2d 180; *Wedmore, supra;* M.J. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA, 1977, p. 78.

> When the trial court has passed upon the issue of competency of a witness and has found the witness to be competent, the reviewing court will interfere only if a manifest abuse of discretion appears. *Morris* v. *State,* (1977) Ind. App., 360 N.E. 2d 1027, *Grecco* v. *State, supra.*"

The trial judge observed JAS and listened to her responses. We cannot say that he abused his discretion in permitting her to testify.

Issues II and III: Alibi.

The charging information fixed the date of the alleged offense at "...on or about October 19 to October 20, A.D. 1982...". Huffman filed his notice of alibi defense, and the State, in its response, alleged that the "...offense occurred on October 19 or 20th". Essentially, Huffman argues here that there was no evidence in the record to support a conviction of the offense occurring on October 19, 20, 1982.

The record does reflect some confusion and uncertainty about the actual dates of the offense. However, there is evidence that JAS was taken to the hospital by her mother on October 23, 1982, the date on which the mother discovered the occurrence of the offense, for examination. JAS testified to three occasions of sexual intercourse with Huffman, the last of which has occurred in the middle of the week prior to the date on which her mother had found out; however, she did not know of the exact time lapse. October 23 was a Saturday; October 19 and 20 were the preceding Tuesday and Wednesday, re-

spectively. JAS was seen going into Huffman's lodging on Tuesday or Wednesday, prior to October 23, by an independent witness. There is no evidence that she went into his lodging at any other time, for any other purpose.

Any uncertainty concerning the date goes to the weight of the evidence. We do not reweigh the evidence nor determine the credibility of the witness. We are of the opinion that Huffman's purely factual argument must fail, and that there was sufficient evidence from which the trier could find that the offense occurred on October 19 or 20.

For the above reasons this cause is affirmed.

Judgment affirmed.

ROBERTSON, J. AND
RATLIFF, J. CONCUR.

APPENDIX B

STATE OF INDIANA
Clerk of the Supreme Court
and Court of Appeals
Marjorie H. O'Laughlin, Clerk
217 State House
Indianapolis, Indiana 46204
Telephone. 232-1930

No. 1-683A176
Russell Huffman V. State of Indiana

Supreme Court has on this day

Appellant's petition to Transfer is hereby Denied. Givan, C.J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 5 day of June, 1984.

MARJORIE H. O'LAUGHLIN
Clerk Supreme Court and
Court of Appeals.